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GRIZZLE *v.* FLETCHER et al.

Sept. 16, 1920.

[105 S. E. 457.]

1. Execution (§ 84*)—Must Follow Judgment upon Which Founded.

—The purpose of a writ of fieri facias issued on a judgment for money is to enforce the collection of the judgment, and it must follow in each material respect the judgment upon which it is founded, and if the judgment is a joint judgment against several, or in favor of several, the execution must be joint also, even though one or more of the parties plaintiff or defendant has died since judgment was obtained.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 428, 429.]

2. Execution (§ 56, 348*)—All Debtors Equally Bound to Creditor; Payment of Execution by Surety Debtor a Satisfaction Thereof.—In a common-law execution of fieri facias the debtors are all equally bound to the creditor, and the whole execution may be made out of the property of a surety, although the principal has abundant property out of which it could be made, and when an execution has been paid off by the surety it is satisfied.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 7, 18.]

3. Judgment (§ 878 (2)*)—Payment by One Debtor Extinguishes Judgment.—The payment by any one of the judgment debtors extinguishes the judgment at law, and a creditor may not sell a judgment to one of the judgment debtors so as to keep it alive at law.

4. Judgment (§ 879*)—Kept Alive by Court of Equity for Benefit of Surety.—A judgment paid by a surety thereon will be kept alive by a court of equity for the benefit of the surety, but this arises out of a doctrine of subrogation, and is unknown to the common law.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 976, 977, 979.]

5. Subrogation (§ 41 (1)*)—Remedy of Surety Who Has Paid Debt.—If a surety who has paid a debt in whole or in part wishes to subject the personal property of his principal by writ of fieri facias, he should proceed by motion under Code 1919, § 5777, and a surety judgment debtor, required to pay a judgment under fieri facias, could not proceed against his principal by having a writ of fieri facias issued in the name of the judgment creditor against his principal.

6. Subrogation (§ 31 (2)*)—Surety Cannot Take Assignment of a Note.—Where a surety pays off a note, he cannot take an assignment thereof to himself so as to enforce the note as such against his principal, but must rely on the implied undertaking of his principal to indemnify.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Russell County.

Action by E. S. Smith against Walter Fletcher and A. L. Grizzle. Judgment for plaintiff. Motion by the first-named defendant to quash an execution obtained in the name of the plaintiff by the last-named defendant, who had paid the judgment, was denied, and the former brings error. Judgment amended by quashing execution and as amended affirmed.

W. W. Bird, of Lebanon, for plaintiff in error.

H. A. Routh, of Lebanon, for defendants in error.

MANKIN *v.* ALDRIDGE.

Sept. 16, 1920.

[105 S. E. 459.]

1. **Judgment (§ 184*)—Notice in Proceeding by Motion Must Set Out Matter Sufficient to Maintain Action.**—In a proceeding by motion for judgment under Code 1919, § 6046, the notice takes the place of the writ and the declaration, and must set out matters sufficient to maintain the action, and what is lacking in allegation cannot be supplied by evidence, and there must be both allegation and proof to entitle plaintiff to a judgment, and the allegation must precede the proof.

2. **Judgment (§ 184*)—Sufficiency of Notice in Proceeding by Motion Tested by Demurrer.**—Whether a notice in a proceeding by motion under Code 1919 § 6046, sets out matters sufficient to maintain the action is tested by a demurrer to the notice.

3. **Judgment (§ 184*)—Procedure by Motion Looked upon with Great Indulgence Regarding Sufficiency of Notice.**—The Procedure by motion under Code 1919 § 6046, is looked upon with great indulgence, and notices are upheld as sufficient, however informal, where they contain sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him, and state sufficient facts to enable the court to say that if the facts stated are proved the plaintiff is entitled to recover.

4. **Pleading (§ 48*)—Test as to Sufficiency of Declaration.**—Declarations are upheld as sufficient where they contain sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him, and state sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover, but less than this will be insufficient, notwithstanding Code 1919, §

*For other cases see same topic and KEY-NUMBER in all Key Numbered Digests and Indexes.